

227679

ENTERED
Office of Proceedings
AUG 23 2010
Part of
Public Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. ³⁵³⁸¹~~35305~~

**AG PROCESSING INC A COOPERATIVE –
PETITION FOR DECLARATORY ORDER**

**ANSWER OF
NORFOLK SOUTHERN RAILWAY COMPANY**

**James A. Hixon
John M. Scheib
Greg E. Summy
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510**

***Counsel to Norfolk Southern
Railway Co.***

Dated: August 23, 2010

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. ³⁵³⁸⁷~~35305~~

**AG PROCESSING INC A COOPERATIVE –
PETITION FOR DECLARATORY ORDER**

**ANSWER OF
NORFOLK SOUTHERN RAILWAY COMPANY**

Pursuant to 49 C.F.R. 1111.4, Norfolk Southern Railway Company ("NS") submits this Answer to the Surface Transportation Board ("STB") in response to the Complaint of Ag Processing Inc A Cooperative ("Ag Processing") in the above captioned proceeding as follows:

1. NS is without knowledge or information sufficient to form a belief as to the remainder of paragraph 1.
2. Paragraph 2 is admitted.
3. Paragraph 3 is admitted.
4. Paragraph 4 states legal conclusions to which no responsive pleading is required.
5. NS admits that NS Tariff 8002-A, Item 5000, effective July 14, 2010 ("the Tariff") addressed overloaded railcars, except for cars loaded with coal, coke, or iron ore, which are addressed by separate tariff. NS otherwise states that the terms of the Tariff speak for themselves. However, Part D of the Tariff, which is the only provision of the Tariff at issue in the Complaint, was superseded on August 4, 2010, and no Ag Processing shipments – or any other shipments – were subject to the Tariff provision.

6. NS admits that the Tariff applied to all shipments moving on NS's lines. NS is without knowledge or information sufficient to form a belief as to remainder of the allegation in paragraph 6.

7. NS admits that Part D of the Tariff addressed rail cars that were overloaded due to a combination of the lading weight and weather. NS otherwise states that the terms of the Tariff speak for themselves. However, Part D of the Tariff, which is the only provision of the Tariff at issue in the Complaint, was superseded on August 4, 2010, and no Ag Processing shipments – or any other shipments – were subject to the Tariff provision.

8. NS admits that Part D of the Tariff addressed rail cars that were overloaded due to a combination of the lading weight and weather. NS otherwise states that the terms of the Tariff speak for themselves. However, Part D of the Tariff, which is the only provision of the Tariff at issue in the Complaint, was superseded on August 4, 2010, and no Ag Processing shipments – or any other shipments – were subject to the Tariff provision.

9. NS denies that Part D of the Tariff “penalizes shippers”. NS otherwise states that the terms of Part D of the Tariff speak for themselves. However, Part D of the Tariff, which is the only provision of the Tariff at issue in the Complaint, was superseded on August 4, 2010, and no Ag Processing shipments – or any other shipments – were subject to the Tariff provision.

10. NS is without knowledge or information sufficient to form a belief as to the remainder of paragraph 10.

11. NS admits that its freight rates for Ag Processing are assessed on a per car basis. NS states that the remainder of paragraph 11 is a hypothetical, which is not a

factual allegation, that requires no response. To the extent a response is required, the remainder of the paragraph is denied.

12. NS states that the first sentence of paragraph 12 is based on a hypothetical, which is not a factual allegation, that requires no response. To the extent a response to the first sentence of paragraph 12 is required, it is denied, except that NS admits that the loading of the rail car is completely within Ag Processing's control and not within NS's control. NS admits that "snow or sleet" "fall or rain" during the winter months, including potentially on routes traversed by Ag Processing cars. NS admits that cars moving along its system are exposed to changing weather conditions along the route and that cars may be stopped and held along the route by NS or a connecting carrier for operating reasons, including switching. NS denies the remainder of paragraph 12.

13. NS is without knowledge or information sufficient to form a belief as to paragraph 13.

14. Paragraph 14 is denied to the extent it does not call for a legal conclusion to which no response is required.

15. Paragraph 15 is denied to the extent it does not call for a legal conclusion to which no response is required.

16. Paragraph 16 is denied to the extent it does not call for a legal conclusion to which no response is required.

17. Paragraph 17 is denied to the extent it does not call for a legal conclusion to which no response is required.

18. Paragraph 18 is denied.

19. NS admits that overweight cars "pose a safety hazard". NS is without knowledge or information sufficient to form a belief as to paragraph 19.

20. Paragraph 20 requires no response. To the extent a response is required, the paragraph is denied.

AFFIRMATIVE AND OTHER DEFENSES

FIRST AFFIRMATIVE DEFENSE

The complaint fails to state a claim that NS has engaged in an unreasonable practice in violation of 49 U.S.C. 10702.

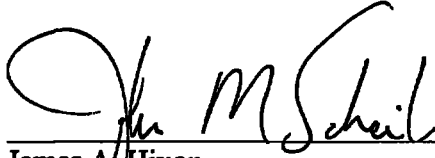
SECOND AFFIRMATIVE DEFENSE

The complaint fails to state an action that is ripe for resolution through a declaratory order action because the subject of the complaint is neither a controversy nor is there any uncertainty to resolve. Part D of the Tariff, which is the only provision at issue in the Complaint, was superseded on August 4, 2010, and no Ag Processing shipments – or any other shipments – were subject to that Tariff provision.

THIRD AFFIRMATIVE DEFENSE

NS has amended Part D of the Tariff since the filing of the Complaint, and therefore the challenged provision is no longer in effect.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "John M. Scheib", is written over a horizontal line.

James A. Hixon
John M. Scheib
Greg E. Summy
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510

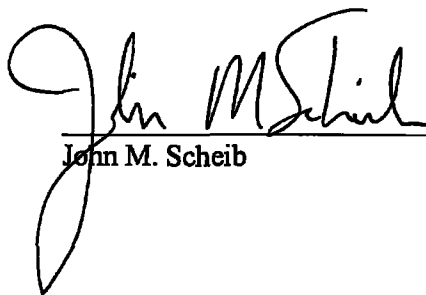
Counsel to Norfolk Southern Railway Co.

Dated: August 23, 2010

CERTIFICATE OF SERVICE

I, John M. Scheib, certify that on this date a copy of Norfolk Southern Railway Company's Answer to the Petition for a Declaratory Order of Ag Processing Inc a Cooperative, filed on August 23, 2010, 2010 was served by email and by first-class mail, postage prepaid, on all parties of record, specifically:

Andrew P. Goldstein
McCarthy Sweeney & Harkaway, PC
Suite 700
1825 K Street NW
Washington, D.C. 20006
(202) 775-5560



John M. Scheib

Dated: August 23, 2010